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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903. No. 88.

THE BRUNSWICK TERMINAL COMPANY,
A CORPORATION, ET AL.,
Appellants,

vs.

THE NATIONAL BANK OF BALTIMORE,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF THE APPELLEE.

WILLIAM L. MARBURY,
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STATEMENT OF FACTS.

The appellee was and is a national banking association doing business in the city of Baltimore, Maryland, and in the month of August, 1890, discounted for one Lloyd, a promissory note for $10,000, drawn by him and a certain F. E. Cunningham, which note was endorsed by the firm of Lloyd and Adams and W. A. Cunningham. As *collateral security* for the payment of said note, the appellee received 110 shares of the capital stock of the Brunswick State

Bank, a corporation of the State of Georgia, engaged under its charter, in a general banking business, (hereinafter, for convenience, designated the "Bank"), said stock being of the par value of $100 per share. In order to protect itself as pledgee, the appellee caused this stock to be transferred into its own name on the books of the "Bank" on or about the 25th of August, 1890. The above-mentioned promissory note having been paid at its maturity, the pledge was at an end, and the pledgee, being under obligation to return the stock, and the pledgor being entitled to its return, the appellee, by direction of the pledgor, re-transferred the stock on the books of the "Bank," which re-transfer was fully completed on said books on or before the 20th of October, 1890. No notice by publication of the fact of this re-transfer was given by the appellee. The appellee never had or claimed any interest in said stock, save under the pledge aforesaid, but never notified the "Bank," its stockholders or creditors, that it held said stock otherwise than as the absolute owner thereof. The appellants who are creditors of the "Bank," had no knowledge in fact that the name of the appellee had appeared upon the books of the "Bank" as stockholder. The appellants, however, did not become such creditors until after the 20th day of October, 1890; *in fact, none of their claims accrued before 1893.*

On or about the 30th day of May, 1893, certain creditors of the "Bank" filed their petition in the Supreme Court of Glynn County, Georgia, alleging the "Bank" to be insolvent, and praying for the appointment of a receiver to take possession of its assets and administer them, and on the 29th of June, 1893, that Court decreed the "Bank" to be insolvent and appointed a receiver for the purposes stated. The State of Georgia and Glynn County being preferred creditors, all the assets of the "Bank" were exhausted in the payment of those preferred claims and the costs of litigation, and nothing was left for the payment of its other creditors.

On January 14, 1898, the appellants filed their bill of complaint in the Circuit Court of the United States for the

District of Maryland against the appellee, and sought to hold it liable as a stockholder in the "Bank" by virtue of the fact that the 110 shares of stock in question had at one time stood in its name on the books of the "Bank" in the circumstances above narrated.

The bill was filed under the provisions of section 9 of the Statute of Georgia, incorporating the "Bank," (being the Act of 1889, page 522), which is as follows: (Italics ours.)

> "Be it and it is hereby enacted that said corporation shall be responsible to its creditors to the extent of its property and assets, and the *stockholders*, in addition thereto shall be individually liable, equally and ratably and not one for another, as sureties to the creditors of such corporation for all contracts and debts of said corporation *to the extent of the amount of their stock therein* at the par value thereof respectively, *at the time the debt was created*, in addition to the amount invested in such shares."

And also section 1496 of the Code of Georgia of 1882, as follows:

> "When a *stockholder* in any bank or any other corporation is individually liable under the charter, and shall transfer his stock, he shall be exempt from such liability unless he receives a written notice from a creditor within six months after such transfer, of his intention to hold him liable, provided he shall give notice once a month for six months of such transfer, immediately thereafter in two newspapers in and nearest the place where such institution shall keep its principal office."

By Statutes of Georgia of 1892, No. 38, p. 55, approved December 12, 1892, the *proviso* in the above-mentioned § 1496 of the Code of 1882, was repealed and re-enacted so as to read as follows:

> "*provided*, he shall within ten days thereafter, cause notice of such transfer to be published once a week for four weeks in the newspaper which publishes the sheriff's sales of the county in which such corporations shall keep its principal office."

The right was reserved to either party to refer to any laws or statutes of the State of Georgia germane to the case. (Record, page 2.)

Other statutes which will be relied upon by the appellee, are as follows:

Statute of Georgia, 1894, pp. 76, 77, No. 122, entitled "STOCKHOLDERS, LIABILITY OF," approved December 18, 1894, which made important changes in favor of stockholders, §§ I, II and VI, being as follows:

> "Section I. Be it enacted by the General Assembly of the State of Georgia, That on and after the passage of this Act, whenever a stockholder in any bank or other corporation is individually liable under the charter, and shall transfer his stock, he shall be exempt from such liability by such transfer, unless such bank or other corporation shall fail within six months from the date of such transfer."
>
> "Section II. Be it further enacted, That the stockholders in whose name the capital stock stands upon the books of such bank or other corporation at the date of its failure, shall be primarily liable to respond upon such individual liability; but upon proof made, that any of said shareholders, at the date of the failure are insolvent, recourse may be had against the person or persons from whom such insolvent shareholder received his stock, if within a period of six months prior to the date of the failure of such bank or other corporation."
>
> "Section VI. Be it further enacted, That all laws and parts of laws in conflict with this law be, and the same are, hereby repealed."

The above sections I and II of the Acts of 1894, appear substantially as §§ 1888 and 1889 of the Code of 1895, Vol. 2, pp. 33 and 34.

As section VI of the Acts of 1894, repealed all conflicting laws, § 1496 of the Code of 1882, as amended by the Act of 1892, No. 38, p. 55, was repealed, and therefore does not appear in the Code of 1895.

Paragraph 4 of the Constitution of Georgia, ratified December 5, 1877, and constituting § 5097 of the Code of Georgia of 1882, p. 1304:

> "BUYING STOCK, ETC., IN OTHER CORPORATIONS; COMPETITION.—The General Assembly of this State shall have no power to authorize any corporation to buy shares, or stock, in any other corporation, in this State, or elsewhere, or to make any contract, or agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage a monopoly; and all such contracts and agreements shall be illegal and void."

The appellants relied upon certain decisions of the Supreme Court of Georgia as decisive of this case, principally the cases of Brobston vs. Downing, 95 Ga. 505, (consisting of head notes only), and Chatham Bank vs. Brobston, 99 Ga. 801. These two cases, for the convenience of this Honorable Court, are reproduced in full in the appendix to this brief.

There is no evidence or admission in this cause of the insolvency of the person or persons in whose name the 110 shares of the stock of the "Bank" in question, stood at the date of its failure.

The answer denied all liability, and after hearing, upon an agreed statement of facts, a decree was passed dismissing the bill. The Court (Morris, Dist. J.), held that the appellee was not liable to the appellants because it had transferred its stock on October 20, 1890, and none of the claims of the appellant had accrued prior to 1893. The Court did not consider the other ground urged by the appellee, that being a national bank, it could not become a purchaser of shares in another corporation, and if it sought to do so, it could not be held liable on such stock. (Record, pages 1-4).

The opinion of Judge Morris is reported in 112 F. R., 812, and for convenience is also reproduced in the appendix to this brief.

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the learned Judges of that Court, Simonton, Ct. J., and Waddill and Brawley, Dist. J. J., being divided and in doubt, certified to this Honorable Court for its construction and advice thereon, the following questions:

1. Is this question of the liability of a stockholder of this bank one of general law, or must we follow without question the decisions of the Supreme Court of Georgia thereon?

2. When shares in another corporation are transferred into the name of a national banking association, is there a presumption, and consequent notice to the world, that such shares are held by such national banking association in some other capacity and not as owner thereof?

2. If a national banking association causes shares in another corporation to be transferred into its own name, is it estopped from setting up the invalidity of such a transaction?

Argument.

1.

As to the first question certified: There can be no doubt that the question of the liability of the appellee as a stockholder of the "Bank" is one of commercial law and general jurisprudence, and consequently the Circuit Court of Appeals is not bound to follow the decisions of the Supreme Court of Georgia thereon.

In *Burgess vs. Seligman*, 107 U. S. 20, being the leading case in this Honorable Court upon the subject, a statute of Missouri imposing upon the stockholders of a corporation at its dissolution a liability for its debts was under consideration. The statute provided that no person holding stock as * * * collateral security, should be personally subject to such liability, but that the persons pledging such stock should be considered as holding the same and liable. In an

action by Burgess who was a judgment creditor of the Memphis, Carthage and Northwestern Railroad Company, a Missouri corporation, against Seligman & Co., who were alleged to be stockholders of that corporation, the judgment of the Circuit Court rendered in favor of the defendant was affirmed, this Court holding—(1.) That persons to whom a corporation pledged its stock as collateral security were within the exemption of the statute—(2.) That certificates of stock absolute upon their face, issued in trust, or as collateral security to a creditor, may be shown to be so held by evidence *in pais*.

After the case was decided in the Circuit Court, the Supreme Court of Missouri made a contrary decision against the same stockholders, at the suit of another plaintiff, holding that the clause of exemption in the statute did not extend to persons receiving from the corporation itself stock as collateral security, notwithstanding which this Court held that it was not bound to follow that decision, saying (italics ours) that

> "the Courts of the United States, in the administration of State Laws in cases *between citizens of different States*, have an *independent jurisdiction*, coordinate with that of the State courts, and *are bound to exercise their own judgment as to the meaning and effect of those laws.*" * * * "So when contracts and transactions have been entered into, and *rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals*, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued." (Ib. pp. 33, 34.)

In the recent case of Stanley County vs. Coler, 190 U. S. 435, certain county bonds had been issued under statutes and sections of the Code of North Carolina, which permitted bonds to be issued to enable counties to subscribe to stock when necessary to aid in the completion of any railroad in which citizens of the county might have an interest. These

bonds were held by this Court to be valid, notwithstanding that the Supreme Court of North Carolina had decided in another action that the bonds were invalid.

Mr. Justice McKenna, speaking for the Court, in the course of his opinion said, at pages 444, 445:

> "The general rule undoubtedly is that we accept the interpretation put by the State Courts upon the State Constitution and statutes. There are exceptions to the rule, and the case at bar presents one of these. The rule and its exceptions are stated in *Burgess vs. Seligman*, 107 U. S. 20." * * *

The learned justice, in commenting upon that case, said in part, (italics ours):

> "The Supreme Court of Missouri held that the exemption of the statute did not extend to persons receiving from the corporation itself stock as collateral security. This Court decided to the contrary, and held that it was not bound to follow the decision of the Supreme Court of the State. The question presented was regarded as one of *commercial law and general jurisprudence, and the right to exercise our own judgment was asserted.* * * * *Burgess vs. Seligman*, was applied in *Folsom vs. Nine-Six*, 159 U. S. 611, to sustain the validity of bonds issued by the defendant township to aid in the construction of a railroad. The power to issue them depended upon several statutes and the Constitution of the State. After the bonds were issued the Supreme Court of the State decided that the statute authorizing the issue of the bonds was unconstitutional. *There had been no decision to that effect prior to the issuing of the bonds.* We held that the decision of the Supreme Court was not binding, and construed the constitution and statutes for ourselves, and sustained the bonds."

Now, in August, 1890, when the 110 shares of stock in question were transferred on the books of the "Bank" from the pledgor to the appellee, as security for the payment of the debt, and in October, 1890, when the same were

re-transferred by the appellee to the pledgor upon the payment of that debt, the law of Georgia as to the status of a person holding shares of stock in a corporation as collateral security was well defined. He was declared not to be a stockholder. This is clear from the case of The National Exchange Bank of Augusta vs. Sibly et al., 71 Ga. 726, decided in 1883, which was an action on the case for deceit by the pledgee of spurious stock of the Augusta and Port Royal Compress Company, a corporation, which stock was represented by the defendants, its directors, to be genuine fully paid stock. The second ground of demurrer to the action was as follows:

> "That it appears from plaintiffs' own showing, that it is a stockholder of the corporation, and has no remedy at law against the directors without making the corporation a party."

As to this contention, the Supreme Court of Georgia said at page 732 (italics ours):

> "As a general proposition, we are not prepared to hold that a party to whom stock in a corporation is hypothecated as collateral security for a debt, thereby *becomes a stockholder in and member of that corporation*, with all the powers and privileges of such stockholder and corporator in the management of the affairs of the Company. *He holds it for a special purpose only;* the owner does not part with the general property, and *the holder is simply a trustee to carry into effect the objects for which the hypothecation was made.* Code, §§ 2780, 2177, 43 Ga. 415. He parts with the title temporarily; *he has the right to redeem at any time by paying the debt; if a sale at all, it is not absolute, but defeasible only.* This dispenses with the necessity of determining the relation between the corporation itself and its directors, as to their respective liabilities for stock issued in excess of the amount authorized by its charter."

To follow the decision in 71 Ga. 726, that a person holding stock of a corporation as pledgee does not thereby become a stockholder, would result in no injury to the

appellants. They did not contract with the "Bank" upon the faith that the appellee was a stockholder; in fact, it is admitted that they had no knowledge that the name of the appellee had ever appeared upon the books of the "Bank" as a stockholder. On the other hand, the greatest injustice would be done to the appellee to hold it liable for debts of the "Bank" contracted three years after the stock which stood in its name had been re-transferred by it to the real owner. The appellee surely was entitled to rely upon the case in 71 Ga., which, in effect, said: "You held this stock as pledgee. You are not to be considered as a stockholder, and, therefore, you are not within the statute which requires notice to be given of the re-transfer of the stock held by you as pledgee."

If we are wrong in this, still there can be no recovery against the appellee, as there is no evidence or admission in the case of the insolvency of the pledgors of the stock to whom it was re-transferred by the appellee. It is not only incumbent upon the appellants to aver, but it is also absolutely necessary for them to prove, that the persons in whose name the stock stood *at the date of the failure of the "Bank"* were themselves insolvent before any liability whatever can be asserted against the appellee.

The Act of 1894, p. 76, § 2 (page 4, ante), governs this case, although not enacted until after the failure of the "Bank," for it is to be observed that the statute does not deprive the appellants of their right to enforce a stockholder's liability against the appellee, if any such liability, in fact, ever existed. It simply provides that no such liability shall be enforced as against the previous owner of stock, until it appears that the person to whom such stock had been transferred, and in whose name it appeared at the date of the failure of the corporation, shall be proven to be insolvent. The statute simply affects the remedy, and not the obligation.

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract."

Sturgis vs. Crownenshield, 4 Wheaton, 122, *200*.
Hill vs. Merchants Ins. Co., 134 U. S. 515, 527.

As an evidence of the tendency of this Court to protect those who hold stock in corporations as mere pledgees from stockholders' liability to creditors, we refer to the recent case of Rankin vs. Fidelity Co., 189 U. S. 242, where all the cases upon the subject are ably reviewed in the opinion of the Court delivered by Mr. Justice Brown.

The appellants however, as above mentioned, rely upon the decisions in 95 Ga. (decided in 1894) and 99 Ga. (decided in 1896), set out in the Appendix to this Brief.

The learned District Judge, in reviewing those cases, (see appendix) said:

"Against this construction the complainants urge a ruling by the Supreme Court of Georgia in the case of *Brobston vs. Downing*, 95 Ga. 505 (1894). This was a proceeding similar to the present one to hold stockholders of the insolvent Brunswick State Bank, resident in Georgia, liable to creditors.

"The Supreme Court of Georgia filed no opinion, but by a head-note memorandum ruled (one of the three judges doubting) that the liability of a stockholder continued for any debt contracted by the corporation at any time, both before as well as after he had transferred his stock, unless he had given notice of the transfer conformably to Section 1496 of the Code.

"This ruling was made four years after the defendant in this case had re-transferred the stock held by it in pledge, from August 25th to October 20th, 1890. The same questions growing out of the liability of the stockholders of the Brunswick State Bank came before the Supreme Court of Georgia, again in *Chatham Bank vs. Brobston*, 99 Ga., 801 (1895). In that case two of the judges considered themselves bound by the previous ruling in 95 Georgia, and the third judge recorded his

dissent. The court recites that Section 1496 of the Code had been repealed, and that the legislature had in 1894, substituted a provision that the individual liability of a stockholder should cease upon transfer of his stock, unless the corporation should fail within six months after the transfer; and that in view of this change in the law differences of opinion between the judges were not important, except as affecting the particular litigation before it. The court says (page 804): 'If another case should arise the decision of which would depend upon the question as to which we disagree, the whole matter would still be open to review by a bench of six justices. Accordingly, we have agreed among ourselves to let the present decision stand upon the head-notes as announced, with the foregoing explanation of our reasons for not entering upon a discussion as to what should be the proper construction of the bank charter now under consideration.

"The present defendant [appellee] was not a party to either of the above-mentioned cases, never was within the jurisdiction of the courts of Georgia, never was a real, but only a nominal shareholder for three months in 1890, and in view of this explanation by the Supreme Court of Georgia it would seem that the question of the liability of the defendant in the case now being considered may be fairly treated as still open for independent consideration and examination.—*Central R. R. vs. Wright*, 164 U. S. 327-332."

Now what is the principle upon which stockholders are liable to creditors of the corporation in which they hold stock?

The general principle is that persons dealing with a corporation have in view the financial standing and responsibility of its stockholders.

As is said in Williams vs. Hanna, 40 Indiana, 544, quoted in Thompson's Liability of Stockholders, section 95:

"The creditor, if he looks to the individual liability of stockholders at all, looks to those who are stockholders at the time he lends his credit and to those he should be content to look for the collection of his debt."

See also—1 Cook on Stockholders, section 259.

Matthews vs. Albert, 24 Md. 527-539.

Stockholders are held to be those appearing as such upon the books of the corporation. And it has been held that a stockholder only ceases to be such when the transfer of his stock is entered upon the books of the corporation.

Statutes imposing double liability upon stockholders are strictly construed.

Cook on Stockholders, par. 214, and cases cited, states:

> "Inasmuch as all statutes creating an additional liability on the part of stockholders are in derogation of the common law, they are to be strictly construed, etc., etc., etc., and are not to be extended beyond the plain intent of the words of the statute."

It follows from the above then, as a general proposition, that a creditor can not look to stockholders of a former date who have transferred their stock before his claim arose.

For to hold otherwise would be to let him claim against every successive owner of the particular stock in question since the chartering of the corporation, and no stockholder could ever be released from his statutory liability. (This, in effect, has been the result of the Georgia decisions quoted above and now set aside by the Legislature of Georgia in 1894.)

And as said by the District Court (appendix):

> "It surely was not to be supposed by any one who examined the charter of the Brunswick State Bank and section 1496 of the Code of Georgia that it was intended to inflict a mere penalty upon those who might from time to time hold its stock by arbitrarily making them liable for all transactions during twenty years after they had ceased to be stockholders."

Therefore it is submitted (1) that, granting that the appellee was from August to October, 1890, the legal owner of the stock, it never had any liability to the appellants after it transferred its stock, since their dealings with the failed bank were all "*subsequent*" to such transfer, and failure to advertise could only (if at all) render it still liable to creditors who were such prior to its transfer of the stock.

(2) That section 1496 can have no further effect than to continue the last stated liability, for to give it greater force by reason of 95 Georgia and 99 Georgia decisions is in effect "legislation by the Court."

Section 1496 as amended contemplated an advertisement contemporaneous with the transfer of the stock and giving a "*creditor*" six months thereafter in which to assert his claim.

The Court will note the difference of opinion between the Judges of the Georgia Supreme Court in deciding 95 Georgia 505 and 99 Georgia 801, and for the opinion of the Supreme Court of the United States upon cases decided upon such "head-notes:" see 164 U. S., pages 332-4, Central R. R. & Banking Co. of Georgia vs. Wright, also decided in reference to Georgia decisions. *A fortiori*, does their condemnation of that Georgia decision apply to those in 95 Ga. and 99 Ga.

II AND III.

Admitting, for the sake of the argument only, that one who was a stockholder of the "Bank" continued liable as such by reason of his failure to give the required notice by advertisement of the fact of the transfer of his stock, it is submitted:

First. That National Banks have only incidental powers to hold stock in another corporation.

Second. Of the powers of a National Bank under the statutes providing for their creation, every one must take notice.

Third. Whatever may be the nature of their holding of such stock, the presumption is against any intention on their part to become the *owners* of such stock.

Therefore we contend that the second and third questions certified should be answered as follows:

2. When shares in another corporation are transferred into the name of a national banking association, there is a

presumption, and consequent notice to the world, that such shares are held by such national banking association in some other capacity and not as owner thereof.

3. And if a national banking association causes shares in another corporation to be transferred into its own name, it is not estopped from setting up the invalidity of such a transaction.

The Supreme Court of the United States has not as yet had before it a case in which it was necessary to decide that a holding by a National Bank *in its own name* (without words of qualification) of stock in another corporation was *per se* notice to all creditors of such corporation that such National Bank was not the absolute owner of such stock, but in a number of recent, well-considered decisions, it has quite plainly indicated that to so hold is the logical outcome of the limited powers for holding stock possessed by National Banks under the Revised Statutes and is the next logical step in the line of cases referred to.

In Robinson vs. Southern National Bank, 180 U. S., page 295, decided February 25, 1901 (following California Bank vs. Kennedy, 167 U. S. 362, and Concord Bank vs. Hawkins, 174 U. S. 364), the Court says at page 305:

> "The reported decisions show that there are two classes of cases of this character,—one, wherein the liability has been enforced against a party defendant in whose name the stock was registered on the books of the bank, regardless of the question whether he was, in point of fact, the owner of said stock,—and the other, where the liability has been enforced against the real owner of the stock, although the stock stood registered on the books in the name of a third person."

And at page 306:

> "In the former class the liability is said to be created by the act of the party in whose name the stock is registered, in holding himself out as a stockholder, and thus inviting others to deal with the bank and become creditors, relying on the reputation and financial strength of the nominal stockholders."

"Cases are also to be found in the books where transfers, made by shareholders, in anticipation of a bank's insolvency, to irresponsible persons, have been held to be fraud on the statute, and inefficacious to relieve the original holder from liability."

Bowden vs. Johnson, 107 U. S. 251.

Richmond vs. Johns, 121 U. S. 27.

Pauly vs. State Loan Co., 165 U. S. 619.

Matteson vs. Dent, 176 U. S. 521 and 530-1.

At page 309:

"It was held in Pauly vs. State Loan and Trust Company (*supra*), that where stock was transferred in pledge, and the pledgee, for the purpose of protecting his contract, caused the stock to be put in his name on the books as *pledgee*, such a registry did not amount to a transfer to the pledgee as owner, and that he therefore was not liable, although the pledgor might continue to be so."

"This Court has held in California Bank vs. Kennedy (167 U. S., 362) and in Concord Bank vs. Hawkins (174 U. S., 364) that it is not competent for national banking associations to *invest* any portion of their capital *permanently* in the stock of another corporation, and that they are not estopped from setting up such want of power against suits to enforce liability for assessments made by the Comptroller of the Currency."

"While not disposed, as at present advised, to push the principle of these cases so far as to exempt such banks from liability as other shareholders, where they have accepted and hold stock of other corporations as collateral security for money advanced (a proposition which we withhold from decision) *we think there is a presumption in such cases against any intention on the part of the lending bank to become owner of the collateral shares.*" (The italics are ours.)

This was the view taken in the case of Baker, Receiver, vs. Old National Bank of Providence, 86 Federal Reporter 1006, (see also Hubbell vs. Houghton, 86 Federal Reporter

547), where it was held, after full consideration, that it is only in clear cases that a pledgee, on the ground of estoppel, can be subjected to liability for an assessment on National Bank stock, instead of the owner, upon whom the legal obligation rests.

The case of Baker, Receiver, vs. Old National Bank of Providence, 86 Federal Reporter, page 1006 (C. C. District of R. I.) May 5, 1898, is a strong one.

> "A pledgee of National Bank stock is not liable as a stockholder for assessments, except by estoppel." (Cases cited.) "Unless by permitting the shares to stand upon the registry in the above form the bank has held itself out as owner, so that upon principles of fair dealing it is estopped, as against creditors, from asserting that it was not in fact owner, there is no ground for holding the defendant bank liable."

It is certainly not "fair dealing" in our case to hold us liable.

The question is one of "holding forth."

In the case at bar, while the appellee did for a time appear on the registry of the "Bank" as a stockholder, yet there was no "*holding forth*" of itself *to the appellants* in that capacity since it had actually ceased to be a stockholder of record long before the appellants became creditors.

> "The creditor, if he looks to the individual liability of stockholders at all, looks to those who are stockholders at the time he lends his credit, and to those he should be content to look for the collection of his debt."
>
> Williams vs. Hanna, 40 Indiana, 544 (quoted Thompson's Liability of Stockholders, section 95.)

The appellants by inspecting the stock registry of the "Bank" would not have found the appellee registered there as a stockholder. On the contrary, they would have found that years before they "lent their credit" to the "Bank," the appellee had transferred its stock to another, and it was

only by their searching the files of the local newspaper and ascertaining that no advertisement had been given, and applying the latest Georgia decisions, that it could in any sense make the appellee out as a "stockholder."

As is said in Baker vs. Bank, *supra*, page 1008:

> "The creditor, who by legal fiction or presumption, is held to rely upon the form of registry of the shares, must also be held to possess the knowledge that the defendant bank has only incidental powers to hold stock in another national bank, (citing Bank vs. Case, 99 U. S. 628, and Bank vs. Kennedy, 167 U. S. 362, 367)."

In 181 U. S. 202 (at pages 216, 217 and 218), Scott vs. Deweese, decided April 21, 1901, (same as Scott vs. Lattimer, 89 Federal Reporter, 843, 857, 862; 60 U. S. Reports, 720, 743, 751), discussing the cases of Bank vs. Hawkins, (174 U. S. 364,) and Bank vs. Kennedy, (167 U. S. 362,) the Court says at page 218:

> "But a National Bank is without authority to use its funds for the purchase of the stock of another National Bank merely for the purpose of investment, and therefore, as held in the 'Hawkins' case, it could not under such circumstances become a shareholder within the meaning of section 5151. Of the powers of a National Bank under the statutes providing for their creation every one must take notice. Whether a National Bank may not be deemed a shareholder, within the meaning of section 5151, if it holds shares of another bank as security for previous indebtedness, is a question suggested in former cases but not decided, and upon which, in this case, no opinion need be expressed."

The appellee did not become a stockholder, except as "pledgee." The Supreme Court said in the Kennedy case that a National Bank might acquire *of necessity* the pledged stock and thus become subject to the liability of a shareholder; but, unless it does thus acquire the title to the stock, is it consistent with the U. S. Banking Law to hold it as a stockholder?

The "holding" contemplated by the Georgia statute must have been a complete holding. There was not this holding by the appellee, and as it was only in fact pledgee, the pledgor could have been held (as the real owner) before the re-transfer.

The ground on which the transferee is held liable is because by the transfer the transferor is discharged, but here he was not discharged, as the appellee only took in pledge. 165 U. S. 611, and 96 U. S. 330.

In Thompson vs. Southern National Bank, 180 U. S. 309, it is held that it is not competent for a National Bank to *invest* its capital *permanently* in another National Bank.

If so, do not the same reasons which induced this decision preclude from holding it accountable for an indefinite time under the Georgia statute?

The trend of these decisions is clearly seen. The point has not been decided, because, although foreseen as the logical outcome of the decisions announced, none of the cases decided has presented the exact point for decision. It is plainly the next logical step in the application of the principle. The mere holding by a National Bank of stock in another corporation puts all persons dealing with that corporation upon inquiry as to what its holding of stock amounts to. It almost amounts to a presumption that it holds it as pledgee. In view of these decisions such holding clearly presumes that it is not the "owner" of the stock, whatever may be its actual relation to it.

In conclusion, we consider: (1) That the question presented by the record is one of mercantile law and general jurisprudence, and the Circuit Court of Appeals is left free to exercise its own judgment independent of the decisions of the Supreme Court of Georgia, reported in 95 Ga., 505, and 99 Ga., 801. Should it be necessary, however, to rely upon the decisions of the Supreme Court of that State, then 71 Ga., 726, is controlling. In this connection, the failure

of the appellants to prove the insolvency of the person in whose name the 110 shares of stock stood on the books of the "Bank" on the date of its failure is fatal, and, of course, relieves the appellee of all liability in the premises;

(2) That when the shares of the "Bank" were transferred on its books to the appellee, the presumption at once arose, which carried with it notice to the world, that such shares were held by it in some other capacity than as owner thereof; and

(3) That in view of the public policy of the State of Georgia, as disclosed by the constitutional provision (ante p. 5), the appellee is not estopped from setting up the invalidity of the transaction.

Respectfully submitted,

WILLIAM L. MARBURY,
FRANK GOSNELL,
ALLAN McLANE,
Solicitors and of Counsel for Appellee.

APPENDIX.

Brobston & Co. et al. vs. Downing, and *vice versa*. Brobston & Co. et al. vs. The Chatham Bank, 95 Ga. 505, October Term, 1894.

SYLLABUS.

BLECKLEY, C. J.

1. With or without a clause in the charter restricting the personal statutory liability of stockholders to the amount of stock at its par value at the time the debt in question was created, the liability exists and continues for any debt incurred by the corporation at any time until the stockholder who claims to be exempt by reason of having sold and transferred his stock before the debt was created, has given notice of such sale conformably to section 1496 of the Code.

LUMPKIN, J., concurring *dubitante*.

2. Where the personal statutory liability of the stockholders of a corporation is to be apportioned amongst all according to the relative amount of stock owned severally by each, and where the corporation is insolvent and has no assets applicable to the payment of its unsecured creditors, one or more of those creditors may bring suit in behalf of themselves and all others who may choose to come in and be made parties against all the stockholders to enforce their statutory liability and apportion the amount which each should contribute to discharge the claims of the various creditors. That some of the stockholders are dead and their estate unrepresented, and some cannot be found within the jurisdiction of the Court, is a sufficient reason for omitting them from the suit as parties defendant.

3. On the facts alleged in the petition, the suit could be maintained without first reducing the claims of the creditors to judgment against the corporation, there being no corporate assets in excess of the claims in favor of secured or preferred creditors. And the fact that the assets have been seized in another suit, which is still pending, and are in the hands of a receiver is no obstacle to the present proceeding.

Judgment reversed on main bill of exceptions in each case; on cross-bill affirmed.

October 22, 1894.

Chatham Bank vs. Brobston & Co., et al. Hull & Lathrop vs. Brobston & Co., et al. Isaac vs. Brobston & Co., et al. 99 Ga. 801, 802, 803, 804. October Term, 1896.

SYLLABUS.

"1. The decisions of this Court in the cases of Brobston & Co. et al. vs. Downing, and *vice versa*, and Brobston & Co. et al. vs. The Chatham Bank, 95 Ga. 505, upon a review thereof, are affirmed.

"2. Where the charter of a bank imposes on all of its stockholders, personal liability to its creditors, such liability attaches as well to those who acquire a complete legal title to the stock of the bank by having the same transferred to them as collateral
[801] security for debts due by the transferers as to those who purchase such stock outright.

"3. Under the charter of the Brunswick State Bank and the general rules of law applicable thereto, a stockholder is individually liable for his *pro rata* part of the corporation debts created before he acquired his shares of stock by transfer, as well as for a like part of those created during his ownership of the shares.

"4. A stockholder in that bank is also liable to the same extent upon debts of the corporation created after he transferred his shares, unless he gave notice of the transfer, as prescribed in section 1496 of the Code."

GOBER, J., concurring.

"As an open question, I would hold that the decisions of this Court in the case of Brobston & Co. et al. vs. Downing, and *vice versa*, and Brobston & Co. et al. vs. The Chathan Bank, so far as announced in the first head note (95 Ga. 505), 802 are erroneous as fixing upon certain stockholders of the Brunswick State Bank, a rule of liability at variance with the provisions of its charter, and therefore ought to be overruled; but inasmuch as a majority of the Court are of the opinion that those decisions are correct and should be affirmed, I concur in the present judgments as rendered."

Argued July 13, and December 3, 1896. Decided February 15, 1897, by Simmons, Chief Justice, Lumpkin, Associate Justice, and Gober, Judge, presiding in place of Atkinson, Justice, disqualified.

LUMPKIN, JUSTICE, AND GOBER, JUDGE:

The 9th section of the charter of the Brunswick State Bank declares "that said corporation shall be responsible to its creditors to the extent of its property and assets, and the stockholders, in addition thereto, shall be individually liable, equally and ratably, and not one for another, as * sureties, to the creditors of such corporation * 803 for all contracts and debts of said corporation to the extent of the amount of their stock therein at the par value thereof, respectively, at the time the debt was created, in addition to the amount invested in such shares."

Section 1496 of the Code of 1882, reads as follows: "When a stockholder in any bank or other corporation is individually liable under the charter and shall transfer his stock, he shall be exempt from such liability unless he receives a written notice from the creditor within six months after such transfer of his intention to hold him liable: *Provided* he shall give notice once a month for six months of such transfer, immediately thereafter, in two newspapers in or nearest the place where such institution shall keep its principal office."

In the case of Brobston & Co. et al. vs. Downing, and Same vs. The Chatham Bank, 95 Ga. 505, this Court in

effect decided that a stockholder in this bank was individually liable for his *pro rata* part of the debts of the corporation created before he became a stockholder as well as for a like proportion of the indebtedness incurred by it while he held his stock. This decision controls the present cases. Upon a review of it duly allowed, Chief Justice Simmons and Justice Lumpkin are of the opinion that it should be affirmed, and Judge Gober, being thus bound by it, of necessity concurs in the judgments now rendered. He is, nevertheless, of the opinion that in dealing with the cases reported in 95 Ga. *supra*, the Court, in so far as it held that a stockholder of this bank could be made liable for any debt created by it before he actually became a stockholder, misconstrued that portion of the bank's charter which is quoted above. If free to do so, he would hold that under the language just referred to, the individual liability of a stockholder of this corporation is limited to such debts only as were contracted during the time he was an owner of stock and up to the date when, relatively to such liability, he legally severed his connection with the corporation. We all *agree that any such owner, although he may have transferred his stock, would still be bound under the above-cited section of the Code for whatever liability the charter fixed upon him, unless he gave the notice provided for by that section.

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In 1894 an Act was passed by the General Assembly which materially modifies the law bearing upon this subject, in that it dispenses with any necessity for a stockholder, upon transferring his stock, to publish notice of the fact in order to be discharged from liability. That Act declares that "whenever a stockholder in any bank or other corporation is individually liable under the charter, and shall transfer his stock, he shall be exempt from such liability by such transfer, unless such bank or other corporation shall fail within six months from the date of such transfer." Act 1894, p. 76; Civil Code, section 1888. In view of the radical change thus made in the law, the difference of opinion which exists between the majority and the minority of the Court as constituted for the hearing of the cases now in hand is apparently, of but little practical importance save as affecting the result of the present litigation. If another case should arise, the decision of which would depend upon the question as to which we disagree, the

whole matter would still be open to review by a Bench of six Justices. Accordingly we have agreed among ourselves to let the present decision stand upon the head-notes as announced with the foregoing explanation of our reasons for not entering upon a discussion as to what should be the proper construction of the bank charter now under consideration.

Judgment in each case affirmed on conditions.

OPINION OF JUDGE MORRIS,

Filed December 18, 1901, and reported in 112 F. R. 812-816.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT ON MARYLAND. [812]

The Brunswick Terminal Co. and others
vs.
The National Bank of Baltimore.
} In Equity.

MORRIS, District Judge.

This is a bill filed January 14, 1898, by the Brunswick Terminal Company and others, creditors of the Brunswick State Bank, a corporation chartered by the State of Georgia, which failed and was declared insolvent in May, 1893.

The object of the bill is to enforce in behalf of the creditors of said Brunswick State Bank against the National Bank of Baltimore, an alleged stockholder, a statutory liability equal to the par value of the stock in the Brunswick State Bank at one time standing in the name of said National Bank of Baltimore.

This case was heard before on a demurrer to the defendant's answer setting up the plea of limitations under the Maryland Statute. This Court overruled the demurrer, and on the plaintiff's appeal to the Circuit Court of Appeals for the Fourth Circuit that decision was reversed and it was held that * the Georgia Statute, by which suits * 813 to enforce rights accruing under acts of incorporation may be brought within twenty years, was applicable, and that the Maryland statute was not to be applied. *Bruns-*

wick Terminal Co. v. *National Bank of Baltimore*, 99 Fed. Rep., 635, 48 L. R. A. 625. The case now comes on to be heard upon the merits.

The agreed statement of facts contains the following:

"That in the month of August, 1890, the defendant discounted for one Lloyd a promissory note drawn by him and F. E. Cunningham for the sum of $10,000, endorsed by the copartnership firm of Lloyd & Adams, and received, together with the note, as the collateral security for its payment, 110 shares of the capital stock of said Brunswick State Bank, of the par value of $100 per share; that, in order to protect itself as pledgee, the defendant caused this stock to be transferred into its own name on the books of the Brunswick State Bank on or about the 25th day of August, 1890; that the said note was paid to the defendant at the time of its maturity and the defendant, being under obligation to return the stock, the pledge being at end and the pledgor entitled to its return, re-transferred the stock on the books of said Brunswick State Bank by direction of the pledgor and said transfer was fully completed on the books of the said bank on or about the *20th day of October, 1890*, but no notice by publication of the fact of said re-transfer was given by the defendant; that the defendant never had or claimed any interest in said stock save under the pledge aforesaid, but never notified the Brunswick State Bank, its stockholders or creditors, that it held said stock otherwise than as the absolute owner thereof. That the indebtedness of said Brunswick Bank to all of the plaintiffs in this cause accrued after the said 20th day of October, 1890, from transactions with said bank commenced after that date and the plaintiffs had no knowledge in fact that the name of the defendant had appeared upon the books of said Brunswick State Bank as a stockholder."

The liability of stockholders of the Brunswick State Bank to the creditors thereof is created by section 9 of its charter, found in the laws of Georgia of 1889, (page 522,) which is as follows:

"Section 9. Be it and it is hereby enacted that said corporation shall be responsible to its creditors to the extent of its property and assets: and the stockholders in addition thereto, shall be individually liable, equally and ratably, and not one for another, as sureties to the creditors of such

corporation for all contracts and debts of said corporation, *to the extent of the amount of their stock therein*, at the par value thereof, respectively, *at the time the debt was created*, in addition to the amount invested in such shares."

By this provision the stockholder is made liable only to the extent of his stock at the time the debt was created. It is admitted that the defendant acquired the stock as pledgee on August 25, 1890, and re-transferred it on October 20, 1890, and it is admitted that all the transactions with the Brunswick State Bank from which the debts of the plaintiffs arose commenced after the date when the defendant had re-transferred the stock on the books of the bank. If we look solely to the wording of section 9, it would seem plain, and not to be disputed, that at the time the debts were created the defendant had no stock in the Brunswick State Bank, and it was under no liability whatever. But the plaintiffs invoke section 1496 of the Georgia Code of 1882, which is as follows:

"When a stockholder in any bank or any other corporation is individually liable under the charter and shall transfer his stock he shall be exempt from such liability unless he receives a written notice from a creditor within six months after such transfer of his intention to hold him liable, provided *he shall give notice once a *814 month, for six months, of such transfer immediately thereafter in two newspapers in and nearest the place where such institution shall keep its principal office."

As by the charter of the Brunswick State Bank a stockholder was only liable as surety to creditors to the extent of his stock in the bank at the time the debt was created, and as the defendant at the time the debts of the plaintiffs were created had no stock in the bank and was therefore under no liability, it does not appear that section 1496 of the Georgia Code could have any application to this defendant. This section is applicable to a stockholder who, being individually liable to a creditor or creditors, shall then transfer his stock. The stockholders in the Brunswick State Bank were only liable for debts created while they held their stock, and, as applied to them, this section means that a stockholder who has become individually liable to a creditor by holding stock at the time the creditor's debts were created shall be exempt from such liability, provided he publishes a notice that he has transferred his stock, unless within six

months after the transfer the creditor gives him notice that he intends to holds him liable. This would seem to be the plain meaning and intention of the statute.

As Section 1496 enables a stockholder, who, by the charter, is already under liability to a creditor, to escape that liability by transferring his stock, unless the creditor gives him notice within six months after the transfer, it is sensible and understandable why notice of the transfer should be given; but, as to persons who as yet had no dealing with the bank out of which debts could be created, to require notice to them would not be sensible, and would be a mere arbitrary penalty, without reason,—a thing which is not to be imputed to the legislature if the section is capable of a more reasonable interpretation. If no notice of transfer by advertisement is given by the stockholder, then no notice within six months need be given by the creditor, and both stand upon the rights given by the charter, unaffected by Section 1496 of the Code.

Against this construction the complainants urge a ruling by the Supreme Court of Georgia in the case of *Brobston vs. Downing*, 95 Ga. 505 (1894), 22 S. E. 277. This was a proceeding similar to the present one, to hold stockholders of the insolvent Brunswick State Bank, resident in Georgia, liable to creditors.

The Supreme Court of Georgia filed no opinion, but by a head-note memorandum ruled (one of the three judges doubting) that the liability of a stockholder continued for any debt contracted by the corporation at any time, both before as well as after he had transferred his stock, unless he had given notice of the transfer conformably to Section 1496 of the Code.

This ruling was made four years after the defendant in this case had re-transferred the stock held by it in pledge from August 25th to October 20th, 1890. The same questions, growing out of the liability of the stockholders of the Brunswick State Bank, came before the Supreme Court of Georgia again in *Chatam Bank vs. Brobston*, 99 Ga. 801 (1895), 28 S. E. 790. In that case two of the judges considered themselves bound by the previous ruling in 95 Ga., and 22 S. E., and the third judge recorded his dissent.

815 The court recites that Section 1496 of the Code had been repealed, and that the legislature had in 1894, substituted a provision that the individual liability of a

stockholder should cease upon transfer of his stock, unless the corporation should fail within six months after the transfer, and that in view of this change in the law differences of opinion between the judges were not important, except as affecting the particular litigation before it. The court says (page 804, 99 Ga., page 791, 27 S. E.): "If another case should arise the decision of which would depend upon the question as to which we disagree, the whole matter would still be open to review by a bench of six justices. Accordingly, we have agreed among ourselves to let the present decision stand upon the head-notes as announced, with the foregoing explanation of our reasons for not entering upon a discussion as to what should be the proper construction of the bank charter now under consideration."

The present defendant was not a party to either of the above-mentioned cases; never was within the jurisdiction of the courts of Georgia; never was a real, but only a nominal, shareholder for three months in 1890; and, in view of this explanation by the Supreme Court of Georgia, it would seem that the question of the liability of the defendant in the case now being considered may be fairly treated as still open for independent consideration and examination. *Central R. R. & Banking Co. vs. Wright*, 164 U. S. 327-332.

Section 9 of the Charter of the Brunswick State Bank, creating the individual liability of stockholders, is in substantially the same words as are used in many statutes in many different States, and its meaning may be said to be fixed by common consensus; and, although the highest court of a State may give it a different and peculiar construction, which will be binding upon those whose liability is afterwards incurred, it would seem but just as to those who have made a *bona fide* transfer of their stock before a different interpretation was announced, that their liability should be governed by the generally accepted meaning.

Carroll Co. vs. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517, was a case with regard to the validity of certain county bonds, which the Constitution and laws of Mississippi provided should not be valid, unless two-thirds of the qualified voters of the county at an election should assent thereto. The Supreme Court of Mississippi construed the words of the Constitution and the laws requiring the assent of two-thirds of the qualified voters to mean

two-thirds of the whole number qualified to vote, and not merely two-thirds of such number as should actually vote at the election, and the Supreme Court of Mississippi for that reason declared the bonds invalid. The Supreme Court of the United States, finding that the *bona fide* holder of the same issue of bonds in the case brought before it was not a party to the case in the State court, and that the rule of construction announced in that case had not been previously established so as to have become recognized as the settled law of the State, did not feel constrained to accept the conclusions of the Supreme Court of Mississippi, for the reason that the generally accepted meaning of similarly worded provisions had been that what was meant was two-thirds of the persons who actually cast their votes.

*816 *Folsom vs. Township* Ninety-Six*, 159 U. S., 625, 626, 627, 16 Sup. Ct. 174, 40 L. Ed. 278;
Pine Grove Tp. vs. Talcott, 19 Wal., 666, 22 L. Ed. 227;
Burgess vs. Seligman, 107 U. S., 20-33, 2 Sup. Ct. 10, 27 L. Ed. 359;
Town of Pana vs. Bowler, 107 U. S., 529-540, 2 Sup. Ct. 704, 27 L. Ed. 424;
Thompson vs. Perrine, 103 U. S., 817, 26 L. Ed. 612;
Butz vs. Muscatine, 8 Wal., 583, 19 L. Ed. 490;
Pease vs. Peck, 18 Howard, 598, 15 L. Ed. 518.

The case now in hand I take to be one in which, for similar reasons, I am not bound to follow the Georgia decision. It surely was not to be supposed by any one who examined the charter of the Brunswick State Bank and Section 1496 of the Code of Georgia that it was intended to inflict a mere penalty upon those who might from time to time hold its stock by arbitrarily making them liable for all transactions during twenty years after they had ceased to be stockholders.

As is said in *Williams vs. Hanna*, 40 Ind., 544, quoted in Thompson's Liability of Stockholders, section 95:

"The creditor, if he looks to the individual liability of stockholders at all, looks to those who are stockholders at the time he lends his credit and to those he should be content to look for the collection of his debt."

See also—1 Cook on Stockholders, section 259;
Matthews vs. Albert, 24 Md. 527-539.

As the defendant did not appear on the stock registry as one of the stockholders of the Brunswick State Bank at the time the complainants gave it credit, no credit could have been given on account of any supposed liability of the defendant as a stockholder.

The unexpected interpretation of the Georgia statute made in 1894 imposing a liability on the defendant growing out of a transfer of stock closed in 1890, in favor of creditors whose debts accrued, as stated in the bill of complaint, during the years 1892 and 1893, has all the elements of injustice which attach to *ex post facto* and retroactive laws. I hold that the defendant is not liable, for the reason that the defendant had no stock at the time when the debts of the complainants were created.

It is also urged that, as the defendant is a National Bank, it had no power under its charter to invest its money in the shares of a corporation.

California Bank vs. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 188;
Concord Natl. Bank vs. Hawkins, 174 U. S. 362, 19 Sup. Ct. 739, 43 L Ed. 1007.

And that the creditors of the Brunswick State Bank, from the fact of this want of corporate power, were effected with notice that the shares standing in the name of the National Bank of Baltimore were not its absolute property, but held as a collateral security, the pledgor being the real owner, and that, therefore, the defendant is not estopped from showing the facts which would have been discovered if enquiry had been made.

Robinson vs. Southern National Bank, 180 U. S. 295-309, 21 Sup. Ct. 383, 45 L. Ed. 536;
Baker vs. Old National Bank (*C. C.*), 86 Fed. 1006.

I am, however, so well satisfied upon the ground already stated that the defendant is not liable that I do not consider this other ground of defense urged by the defendant.

I will sign the decree dismissing the bill of complaint.